

**UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF NEW JERSEY**

**CHRISTINE BERNAT,**

**Plaintiff,**

**CIVIL ACTION NUMBER:**

**-vs-**

**3:12-cv-02649-MAS-LHG**

**STATE OF NEW JERSEY DEPARTMENT OF  
CORRECTIONS, WILLIAM HAUCK,  
individually as administrator of  
the Edna Mahan Correction  
Facility for Women, ERICK MELGAR,  
JANETTE BENNETT, ALFRED E.  
SMALLS, JEFFREY S. ELLIS, LANCE  
K. JOHNSON, all individually and  
in their capacity as a current  
and/or former State Correctional  
Officer, JOHN DOE 1-10, and JOHN  
DOE ENTITY 1-10,**

**MOTION/DECISION**

**Defendants.**

Clarkson S. Fisher United States Courthouse  
402 East State Street  
Trenton, New Jersey 08608  
October 28, 2015

**B E F O R E:** HONORABLE MICHAEL A. SHIPP  
UNITED STATES DISTRICT JUDGE

**A P P E A R A N C E S:**

CUTOLO MANDEL LLC  
BY: JASON N. SENA, ESQUIRE  
Attorneys for the Plaintiff.

OFFICE OF ATTORNEY GENERAL  
BY: ROBERT P. PREUSS, ESQUIRE  
Attorneys for the Defendants.

Certified as True and Correct as required by Title 28, U.S.C.,  
Section 753

/s/ Cathy J. Ford, CCR, CRR, RPR

## MOTION

1 THE DEPUTY COURT CLERK: All rise.

2 (Open court begins at 9:59 a.m.)

3 THE COURT: Please be seated. Good morning.

4 COUNSELS: Good morning, your Honor.

5 THE COURT: We are here today first, a number of  
6 matters on this morning, in the matter of Christine Bernat  
7 versus State of New Jersey, Department of Corrections, et al,  
8 Docket Number 12-2649.

9 May I have appearances of counsel, please.

10 MR. SENA: Good morning, your Honor. Jason N. Sena,  
11 S-E-N-A, appearing from Cutolo Mandel on behalf of the  
12 plaintiff standing in for Mr. Mandel, who is sitting on a  
13 continuing trial today.

14 THE COURT: Thank you.

15 MR. PREUSS: Deputy Attorney General Robert Preuss  
16 appearing on behalf of Defendants Hauck, Ellis and Johnson.  
17 Good morning, your Honor.

18 THE COURT: Good morning to you as well.

19 So before the Court today is Defendants State of New  
20 Jersey Department of Corrections, William Hauck, Jeffrey  
21 Ellis, and Lance Johnson's motions for summary judgment. With  
22 respect to the moving Defendants, Plaintiff alleges that the  
23 individual Defendants failed to protect her from the sexual  
24 and physical abuse of Defendants Erick Melgar and Alfred  
25 Small, who were officers at the facility where she was

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1 incarcerated. In addition, Plaintiff alleges that Defendant  
2 Ellis threatened to keep her from disclosing the abuse and,  
3 once she disclosed the abuse, Defendant Johnson retaliated  
4 against her for this disclosure. Based on these allegations,  
5 Plaintiff brings claims for violations of federal and state  
6 civil rights acts and for related state tort claims. Moving  
7 Defendants argue that Plaintiff has failed to show any  
8 evidence to support these claims.

9 In particular, with respect to the individual  
10 Defendants Hauck, Ellis and Johnson, Defendants argue that  
11 Plaintiff cannot show that these Defendants knew about the  
12 inappropriate conduct of Defendants Melgar and Smalls prior to  
13 June 20, 2010, which was the date of Officer Melgar's last  
14 sexual contact with Plaintiff. Defendants argue that without  
15 this knowledge Plaintiff cannot show that Defendants were  
16 "deliberately indifferent" to Plaintiff's abuse, which is  
17 required for her claims under the federal and New Jersey Civil  
18 Rights Acts. In addition, Defendants argue that without this  
19 knowledge, Plaintiff's negligence claims fail because "an  
20 employer will only be held responsible for the torts of its  
21 employees beyond the scope of employment where it knew or had  
22 reason to know of particular unfitness, incompetence or  
23 dangerous attributes of the employee and could reasonably have  
24 foreseen that such qualities created a risk of harm to other  
25 persons." *Di Cosala v. Kay*, 91 N.J. 159, 173 (1982) (emphasis

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1 added). In its opposition, Plaintiff argues that Defendant  
2 Hauck had notice of Officer Hauck's conduct as early as  
3 February 2008 but failed to take any action until June of  
4 2010. Accordingly, Plaintiff argues that Defendants'  
5 knowledge as to the risk of Hauck's conduct is at least a  
6 disputed issue of material fact and thus precludes summary  
7 judgment.

8 So, gentlemen, have I framed your issue before the  
9 Court properly and completely?

10 MR. SENA: Yes, your Honor.

11 THE COURT: With that, then, it's Defendant's motion.  
12 Let me hear from you first, Mr. Preuss.

13 MR. PREUSS: Judge, it's worthwhile to remember that  
14 the issue here is deliberate indifference, basically. And,  
15 again, given the case law, basically, deliberate indifference  
16 is more than simply a notice of a series of facts that might  
17 give rise to an inference of danger, it actually requires that  
18 the defendant take the inference from that fact and  
19 nonetheless disregard it. There is no evidence of that in  
20 this case. In fact, the only competent evidence that is on  
21 this record having to do with how getting notice of what was  
22 going on, was the June 24th report based on the June 23rd  
23 comment Streater made to DeVita that, Oh, DeVita says that  
24 Melgar is hugging up on her and he's taking her commissary  
25 items. And Hauck acts with breathtaking speed.

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1           The first thing he does is he orders an  
2 investigation; that very same day he also moves Melgar out of  
3 the unit and puts in a directive that Melgar is not to be on  
4 the unit again. Thereafter, there is an investigation, a very  
5 comprehensive investigation that goes forward, and the inmates  
6 don't cooperate with it. If Hauck was really deliberately  
7 indifferent, he could easily have said, Well, they claim now  
8 that nothing is happening, we're going to drop it. But that's  
9 not what he did, and that's not what the investigator did.  
10 They continued to push. And eventually they got all the  
11 inmates coming out and saying, you know, this guy is doing all  
12 these horrible things. But there is at least one exception to  
13 the inmates coming out and admitting to what was going on, and  
14 that exception, of course, is the Plaintiff herself, who  
15 continues to deny that anything happened. She continues to  
16 say, Oh, no, they're just concerned because they just don't  
17 like him because he insists on enforcing the rules. And this  
18 goes on for several months.

19           In the mean time, the other inmates have now come  
20 forward. They are saying to Hauck and to Zdonowski, who is  
21 the investigator, this guy is doing all these inappropriate  
22 things, he's hitting people with rulers, he's throwing ice on  
23 them, several of them say that there might be some kind of  
24 sexual contact, somewhat di minimus sexual contact, not the  
25 kind that the Plaintiff alleges, but sexual contact,

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1 nevertheless.

2 And as soon as the report is done and Hauck becomes  
3 aware of it, he was on vacation when it first came out so  
4 there was a five or six day hiatus, but as soon as the report  
5 is done, he goes out and he starts termination proceedings  
6 against Melgar. In the mean time the Plaintiff herself has  
7 still not made a complaint about Melgar. She has still not  
8 fessed up to the fact that Melgar is doing anything to her,  
9 nor has she made any complaint about Smalls at this point. By  
10 the way, based on Smalls' testimony in his deposition --

11 THE COURT: Didn't Smalls testify that it was common  
12 knowledge that commanding officers at the facilities were  
13 sexually involved with the inmates?

14 MR. PREUSS: Smalls' testimony with regard to that  
15 was totally dependent on his having heard rumors that certain  
16 officers had been fired or had ceased to be there anymore;  
17 that's hardly an indication of deliberate indifference.  
18 That's an indication that when they got wind of this, they  
19 took action and then he became aware of it. Besides which,  
20 his testimony with regard to that would be pure hearsay. Who  
21 actually said all these things? He doesn't claim that anybody  
22 said anything. I don't think that's something he could  
23 testify in a trial to because it would be clearly a conclusory  
24 statement that's based on hearsay. So, it seems to me that  
25 that could be absolutely disregarded.

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1           And, in any event, there is no testimony at all and  
2 no evidence at all that Hauck was aware of this. Smalls  
3 doesn't say that Hauck was aware of it. Hauck specifically  
4 denies being aware of it. Where's the evidence that Hauck was  
5 aware of it even if there were rumors. And as I said, the  
6 rumors themselves would be hearsay. And it appears from  
7 Smalls' testimony at the deposition that that information came  
8 from the fact that certain people ceased to be there because  
9 they were going to be disciplined for it.

10           THE COURT: Talk to me about Therese Afdahl's letter  
11 and any information that may have been contained in that  
12 letter and whether or not you believe that that's admissible  
13 even?

14           MR. PREUSS: No, I do not believe that that's  
15 admissible. First of all, it's totally unauthenticated.  
16 Hauck denies -- Hauck obviously didn't see these letters until  
17 years after the fact. But when he got the letters, he said,  
18 there were certain things that were done with inmate letters.  
19 (1) was he would write a note on it; and (2) if that wasn't --  
20 there was no note on it, there would be a stamp on it. He  
21 said, there was no note, no stamp on this letter. As far as  
22 he doesn't remember ever seeing it, he doesn't believe he did  
23 see it. There is no proof on the other side that he actually  
24 did see it; that it was ever sent; that it was ever received  
25 by Mr. Hauck.

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1           In addition, I would just point out that the letter  
2   itself isn't even signed by Therese Afdahl. We have no idea,  
3   based on this record, where that letter came from, none  
4   whatsoever. You can't just bring in evidence -- I mean, if  
5   you were at trial, you'd have to authenticate that. There  
6   would have to be some testimony that said, Yes, Hauck actually  
7   received this or at least that somebody sent this. But  
8   there's nothing like that. Nothing at all on the record that  
9   even suggests that.

10           In addition, when you look at that letter, you look  
11   at the content of that letter, the content of that letter is  
12   really, I don't believe in light of Hauck's immediate and  
13   overwhelming response when he finally did learn about what was  
14   going on with Melgar, I don't think it's enough to show that  
15   he was deliberately indifferent or that he disregarded a known  
16   risk. The letter itself says very little more than, Well, I  
17   made a complaint months ago, bear in mind that the letter  
18   itself is not asking Hauck to do anything, which I guess would  
19   suggest that whatever Afdahl had complained about, she  
20   complained about to other officers and maybe had it stopped.  
21   But she's not complaining about it then. She's saying but I  
22   think there might be retaliation going on because I made those  
23   complaints. And what is she complaining about? He's hitting  
24   people with rolled up newspapers, that's what she's  
25   complaining about. That's not sexual conduct, certainly. I



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1 don't think anybody would say that that would give you notice  
2 that he's sleeping with one of the inmates. So it seems to  
3 me -- and, in any event, again, the standard for deliberate  
4 indifference is more than even that he gets -- he knows of  
5 facts that result in an inference. It's also did he take the  
6 inference? There is no evidence at all that Hauck himself  
7 ever believed that, based on that letter, or anything else,  
8 that Melgar constituted a danger to anybody on that unit until  
9 June 23rd -- on June 24th of 2010 when he first got wind of  
10 the allegations that Streater had made to DeVita and at that  
11 point he takes immediate action. Given that, it seems to me  
12 one cannot draw an inference that he was indifferent based on  
13 that probably he didn't know about it because there is no  
14 evidence that he did know about it, but even if he did know  
15 about it, clearly he must not have taken it seriously at that  
16 point. And I have to point out that under the law, at least  
17 with regard to 1983, his subjective state of mind would be  
18 important. And in that case there is no -- absolutely no  
19 evidence that he thought that anything was going on with  
20 Melgar that he disregarded.

21           So, it seems to me, though, that that letter again  
22 has to be disregarded, first, because it's inadmissible, it's  
23 not an appropriate support for a summary judgment motion; and,  
24 in addition, just because its allegations are so far removed  
25 from what's going on. Bear in mind, this letter is being sent

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1 on February 28th of 2008. It talks about activities that  
2 occurred months before that. And Bernat doesn't even get to  
3 the unit until December of 2009. And then, of course, her  
4 last time with Melgar is June 2010. Again, I think it's  
5 simply insufficient to create an issue of fact with regard to  
6 that, at least, on the issue of deliberate indifference or,  
7 for that matter, on negligence.

8 THE COURT: Also, just for the record, I want to hear  
9 your position on the qualified immunity arguments that you've  
10 raised.

11 MR. PREUSS: Well, I think with regard to Melgar, the  
12 qualified immunity I think is very clear. Melgar had no  
13 reason to think -- even if you were to allow for the letter, I  
14 don't think he would have had any reason to think that his not  
15 taking immediate action on something is as diluted as that  
16 would have been a denial of the constitutional rights. And he  
17 certainly, once he did get hard information, he did take  
18 immediate action and nobody's even claiming that his immediate  
19 action denied their rights.

20 With regard to Ellis and Johnson the case law is  
21 fairly clear that merely vulgar comments, that kind of thing,  
22 is not the basis for a 1983 action, nor would it be the basis  
23 for any of the tort claims that were brought. And for that  
24 reason, it seems to me, there's no clear evidence whatsoever,  
25 no clear case law whatsoever, that anything that Ellis or

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1 Johnson did, much less Hauck, would have violated a  
2 constitutional right.

3 And for that reason I think that all three of them  
4 would have been entitled to qualified immunity.

5 THE COURT: Do you give any merit to any of the  
6 factual allegations set forth by Plaintiff with regard to the  
7 confiscation of personal belongings and alike that may have  
8 risen to a constitutional violation?

9 MR. PREUSS: No, Judge, because, bear in mind, we're  
10 talking about a prison here, not a tea party. We're talking  
11 about a place where things are grabbed all the time. I don't  
12 think that there is any case law that says that the court has  
13 to stand up as an appellate court with regard to the seizure  
14 of things like potato chips and sewing kits. There could be  
15 lots of reasons for seizing such things, but I don't think  
16 that amounts to a constitutional violation.

17 THE COURT: Thank you, Mr. Preuss.

18 MR. PREUSS: Thank you, your Honor.

19 THE COURT: Counsel, let me hear from you in  
20 opposition.

21 MR. SENA: Thank you, your Honor.

22 Your Honor, in the Court's December 31st, 2013 order  
23 issued an opinion that reads: Officer Melgar's prior sexual  
24 and physical misconduct with female inmates and his inaction,  
25 meaning Hauck's inaction, upon said notice caused our client's

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1 sexual and physical abuse by Officer Melgar.

2           Your Honor, we have a certification from five  
3 different inmates saying that Hauck was provided with notice  
4 of sexual horseplay by Officer Melgar as early as 2008. We're  
5 entitled to every reasonable factual inference on this motion  
6 for summary judgment. I think based upon those five  
7 certifications alone that clash directly with what Hauck says  
8 happened. And when he received notice, at minimum, we're  
9 entitled to present that case to a jury.

10           As your Honor stated before, Corrections Officer  
11 Smalls gave detailed testimony about how this facility was  
12 essentially run sort of like a frat house where officers  
13 regularly slept with inmates and that complaints that he made,  
14 after coming from another facility with more strict policies,  
15 were simply physically torn up or told that it would be dealt  
16 with amongst the upper prison management.

17           We also have the letter that my adversary mentioned.  
18 That letter on its face is sufficient to raise an issue of  
19 disputed material fact as to whether Hauck received notice in  
20 2008. A jury can certainly determine whether or not the  
21 letter was actually sent. We can have Ms. Afdahl here to  
22 testify regarding the letter.

23           THE COURT: But, Counsel, isn't there a problem with  
24 the letter? With regard to the admissibility of the letter,  
25 there is no authentication as to whether or not it -- it's not

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1 signed, it's not stamped, it's not marked in the same way that  
2 other letters have been marked, why would that be admissible?

3 MR. SENA: We feel it would be admissible if Ms.  
4 Afdahl herself testified to that in court. If it wasn't  
5 stamped, we submit, your Honor, that they could have simply  
6 elected not to stamp it. Of course, they would stamp it  
7 "received" when they received the letter, if it was something  
8 that they were trying to sweep under the rug, maybe they would  
9 choose not to stamp it.

10 THE COURT: They were sweeping it under the rug back  
11 in 2008, prior to any knowledge that they need this in 2014  
12 for a proposed motion for summary judgment?

13 MR. SENA: We feel that it fits well within the  
14 testimony of Officer Smalls who testified that the prison was  
15 always run in that fashion.

16 THE COURT: But Officer Smalls' testimony was not  
17 quite as specific as you're indicating right now, was it?

18 MR. SENA: That may be true, your Honor, but I think  
19 the jury can weigh the import of the testimony as to Officer  
20 Smalls.

21 THE COURT: Okay. Why don't you continue.

22 MR. SENA: Sure. If my adversary states that the --

23 THE COURT: Other than the letter from Ms. Afdahl and  
24 the testimony that you're pointing to from Officer Smalls, is  
25 there any other evidence as to Defendant's knowledge of the

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1 abuse before June 2010?

2 MR. SENA: I believe the five certifications from the  
3 five different inmates that he was put on notice in 2008 are  
4 themselves sufficient to create a disputed fact. They certify  
5 that he received notice. He says he didn't receive notice.  
6 If there were questions as to exactly what type of notice was  
7 provided, there could have been discovery conducted on that  
8 issue. I didn't see any of that discovery conducted in the  
9 file.

10 We feel the certifications from the inmates, the  
11 letter, although they're questions your Honor raised in the  
12 testimony of Officer Smalls, when viewed most favorably to Ms.  
13 Bernat, certainly create disputed facts and a reasonable juror  
14 could certainly find in her favor after hearing that  
15 testimony.

16 As to whether Defendant Hauck acted with a deliberate  
17 indifference; state of mind is an issue that is very rarely  
18 decided on summary judgment, as the case law provides.

19 As I stated, the conduct of the guards and the upper  
20 prison management in this facility was -- is known to be,  
21 let's say, untraditional. Hauck denied knowing that he had  
22 written notice; five inmates say that he did. Whether or not  
23 he knew is a factual determination that a jury should make  
24 that I don't think we could make on summary judgment, based  
25 upon the facts that we have before this Court today, and based

—MOTION—

1 upon this record.

2           We have testimony from Officer Smalls in that regard  
3 stating that Defendant Hauck actually befriended certain  
4 inmates and was posing for pictures with inmates with his arm  
5 around him congratulating him for certain accomplishments.  
6 That in itself is a direct contradiction of the state's own  
7 policy with regard to familiarity with prison inmates. If we  
8 have testimony from an officer saying that the prison  
9 administrator was doing that, we have testimony from the same  
10 officer saying that sleeping with inmates is a widespread  
11 thing that guards did, and we know that it happened in this  
12 case, then, I think, that a reasonable juror could at least  
13 conclude that Defendant Hauck had notice of everything that  
14 was going on right under his nose. Everybody else knew about  
15 it.

16           In fact, Corrections Officer --

17           THE COURT: But aren't we required to have actual  
18 knowledge here not "should have known."

19           MR. SENA: That's correct, your Honor. I'm sorry if  
20 I misspoke. I think a reasonable juror could --

21           THE COURT: I mean, we can't argue that everybody  
22 else knew and it was going on under his nose and, therefore,  
23 he should have known.

24           MR. SENA: But I think based upon this evidence, upon  
25 this record, a juror could conclude that he actually knew. We

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1 have a letter addressed to him from an inmate.

2 THE COURT: The letter from Ms. Afdahl.

3 MR. SENA: Yes.

4 THE COURT: I'm going to be very frank with you,  
5 Counsel, I don't know if that letter is admissible. It's not  
6 authenticated. And you've not done anything to authenticate  
7 it. And so that letter in and of itself is not going to cut  
8 it. So, aside from that, how do you get to actual knowledge?

9 MR. SENA: We have the five certifications from the  
10 inmates, your Honor.

11 THE COURT: Okay. And I'm going to take another look  
12 at those.

13 But what are you alleging that those five  
14 certifications show?

15 MR. SENA: They state that he was provided with  
16 notice in 2008.

17 THE COURT: Okay.

18 MR. SENA: And I think on those five certifications  
19 alone, I think that --

20 THE COURT: Nivi, can I get those five  
21 certifications. Okay, you can continue while she's getting  
22 them.

23 MR. SENA: Sure. I believe it's Exhibit F to our  
24 opposition, attached to the back of the pleading.

25 I think those five certifications alone, your Honor,



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1 provide sufficient disputed fact that a jury needs to decide,  
2 whether or not those certifications -- I mean, that notice in  
3 2008 constitutes deliberate indifference based upon his  
4 reaction not instituting an investigation until 2010, which,  
5 by the way, this whole incident was brought up by a prison  
6 psychologist at a meeting of upper management, that's the  
7 first time that he ever took action when it came out in  
8 public. I think that based upon all the evidence that we've  
9 cited in our opposition, a jury certainly can find in our  
10 favor and people go to jail based upon circumstantial  
11 evidence. We feel that the totality of the evidence in this  
12 case certainly shows enough circumstantial evidence that Hauck  
13 knew what was going on and chose to ignore it until it came up  
14 in public years later.

15           We feel that the same argument holds true to the  
16 counts of negligence. They had a statutory duty to ensure  
17 that Ms. Bernat was safe from harm.

18           And if you, excuse me, your Honor, I apologize, I'm  
19 going through my notes, this is my first time appearing on the  
20 case. If I pause slightly, I apologize.

21           THE COURT: You're doing a great job, Counsel. Thank  
22 you.

23           MR. SENA: Thank you.

24           There is no dispute that the State Defendants had a  
25 statutory duty to ensure that Ms. Bernat was safe from harm.

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1 We know that that didn't happen and we feel that there is  
2 serious factual issues that a jury needs to decide as to  
3 whether Hauck was on notice.

4 And Ellis and Johnson who, by the way, they were  
5 shift supervisors; they were sergeants. They worked above  
6 Melgar. We have direct evidence that they were on notice  
7 because they told our client that they knew about it. And  
8 whether or not that would constitute negligence, I believe, is  
9 an issue that the jury should decide.

10 As to the issue of qualified immunity that your Honor  
11 raised, I believe that the standard is that Defendant Hauck  
12 knew, or should have known, about this incident in order to  
13 obtain qualified immunity. That too is a fact issue for the  
14 same reasons I just stated.

15 THE COURT: How do these five certifications show  
16 anything?

17 MR. SENA: They incorporate, by reference, the  
18 pleading filed by Therese Afdahl in a separate action by  
19 certifying that the allegations in that complaint are true and  
20 accurate. It's a verified complaint as well. They  
21 incorporate in reference all the allegations in that  
22 complaint.

23 THE COURT: Go ahead.

24 MR. SENA: At minimum, your Honor, all of the  
25 evidence that we've cited, certifications that your Honor just

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1 read, the letter, the testimony of Officer Smalls, it all goes  
2 to the credibility of Mr. Hauck and it all can be used at  
3 trial to impeach Mr. Hauck. He, in his own deposition,  
4 deviated at least once about when he found out about the  
5 sexual assault against Ms. Bernat. He first stated that it  
6 was during the investigation, and then he stated it was at the  
7 deposition. There's credibility issues --

8 THE COURT: At the deposition? Oh, yeah, that's  
9 right. He did say that was the first time he heard it. Okay.  
10 Go ahead.

11 MR. SENA: There's credibility issues there that need  
12 to be determined by a jury, especially in light of the  
13 evidence that we've presented. And the evidence that we've  
14 presented can come in at trial for purposes of credibility, it  
15 can come in for purposes of impeachment.

16 We feel that based upon the totality of the  
17 circumstances in this case, the allegations in the pleadings  
18 have been supported by discovery that we've obtained and which  
19 may still have been shielded from us based upon the fact that  
20 we found out that Officer Melgar has an entire file on this  
21 case that wasn't produced in discovery. I think that your  
22 Honor can draw an adverse inference certainly based upon the  
23 information that may or may not be contained in the file. Who  
24 knows, maybe the letter is in the file. We don't know because  
25 it hasn't been produced. But based upon that alone, I think

—MOTION—

1 your Honor can at least draw an adverse inference and deny  
2 this motion for summary judgment. And additionally, based  
3 upon the facts that we've produced in discovery and how they  
4 fit within the pleadings created a sufficient disputed  
5 material fact that we think that it should be presented to a  
6 jury. Thank you, your Honor.

7 THE COURT: Thank you, Counsel.

8 Mr. Preuss, a very short reply. I'd like you to  
9 address a few things for me. First of all, counsel has  
10 indicated these five certifications incorporate, by reference,  
11 some kind of support in a separate action that was filed  
12 Afdahl v. Melgar. It's a state court matter in Hunterdon  
13 County. Can you address that for me?

14 MR. PREUSS: Yes, Judge. There is only one  
15 allegation in that entire complaint that would be relevant to  
16 this. And it says, I believe it was Paragraph 105 of the  
17 complaint, which, it says, I quote, Defendant Hauck was  
18 personally informed by Plaintiff Afdahl and/or others about  
19 the abusive behavior of Defendant Melgar as early as 2008 yet  
20 did nothing to prevent it, nor did he report it to his  
21 superior. That's a conclusory statement. It's not even an  
22 unequivocal statement, because it says, "and/or others." It  
23 doesn't even say who reported it. It doesn't say how it was  
24 reported. It doesn't tell us anything about it. I think you  
25 need a little bit more to establish his knowledge about

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1 anything than certifications attached to a complaint that  
2 don't even directly say that. And in particular, how would  
3 you evaluate whether or not Hauck would have known? It would  
4 appear that they're talking about -- well, I don't know what  
5 they're talking about. We don't know what the basis for that  
6 allegation is. We don't know the substance of it. It's  
7 something I don't think somebody could testify to in front of  
8 a jury. You couldn't say, Well, he was informed either by  
9 Afdahl or others, you couldn't say that, because that would be  
10 inappropriate. So, it seems to me that we can disregard that,  
11 along with the other things.

12 THE COURT: Go ahead.

13 MR. PREUSS: The other thing I wanted to raise, there  
14 was a point raised about Mr. Hauck not knowing about the  
15 sexual misconduct. I have to point out, Bernat didn't admit  
16 to the sexual misconduct until Hauck had already read the  
17 initial report and then fired Melgar. From his point of view,  
18 at that point, it would have been irrelevant. Later on there  
19 was a supplemental report that included the sexual conduct  
20 which then became the basis for terminating Smalls, but the  
21 termination of Melgar was based on the allegations by other  
22 inmates, not by Ms. Bernat. And I guess that's all I have to  
23 say. Thank you.

24 THE COURT: Thank you very much, Counsel.

25 Counsel, I am going to have to take a brief recess

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1 and take a quick look at a few items before I could rule.

2 I do intend on making a ruling on this matter so I'm  
3 going to ask you folks to sit tight while I hear the next case  
4 and then I'm going to take a short recess and I'll come back  
5 with a ruling on your case.

6 MR. PREUSS: Thank you, your Honor.

7 MR. SENA: Your Honor, can I be heard very, very  
8 briefly on one point, on only one point.

9 THE COURT: Only on one point, Counsel. This is  
10 Defendant's motion, they usually get the last word on reply.

11 MR. SENA: Just one point only, I promise it's going  
12 to be very brief.

13 THE COURT: Okay, Counsel, go ahead.

14 MR. SENA: It's actually the certifications. I  
15 recognize that we are arguing here before your Honor and that  
16 we can spin facts to support our case.

17 The certifications by the inmates are sworn  
18 statements based upon a verified complaint. I recognize that  
19 counsel can make arguments based upon the facts and how a jury  
20 would interpret it, I think that's left to the jury. That's  
21 the only point that I wanted to make.

22 THE COURT: Thank you.

23 MR. PREUSS: Thank you, your Honor.

24 (Recess is taken.)

25 THE COURT: At this time, I'd like to see the counsel

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1 for the Bernat matter back at counsel table, please.

2 We're back on the record in the Bernat versus State  
3 of New Jersey, Department of Corrections, *et al.* Docket Number  
4 12-2649 matter. I'm prepared to put my decision on the  
5 record. I'm not going to read citations on the record, the  
6 citations will be included in the transcript if you so choose  
7 to order one.

8 Presently before the Court is Defendants State of New  
9 Jersey, Department of Corrections, Edna Mahan Correctional  
10 Facility for Women, William Hauck, Jeffrey S. Ellis, and Lance  
11 K. Johnson's Motion for Summary Judgment. Summary judgment is  
12 appropriate where the Court is satisfied that "there is no  
13 genuine issue as to any material fact and that the movant is  
14 entitled to a judgment as a matter of law." Fed. R. Civ. P.  
15 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).  
16 A factual dispute is genuine only if there is "a sufficient  
17 evidentiary basis on which a reasonable jury could find for  
18 the nonmoving party," and it is material only if it has the  
19 ability to "affect the outcome of the suit under governing  
20 law." *Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 423 (3d  
21 Cir.2006); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
22 242, 248 (1986). Disputes over irrelevant or unnecessary  
23 facts will not preclude a grant of summary judgment.  
24 *Anderson*, 477 U.S. at 248. "In considering a motion for  
25 summary judgment, a district court may not make credibility

## —MOTION—

1 determinations or engage in any weighing of the evidence;  
2 instead, the non-moving party's evidence is to be believed and  
3 all justifiable inferences are to be drawn in his favor."  
4 *Montone v. City of Jersey City*, 709 F.3d 181, 191 (3d  
5 Cir.2013) (quoting *Marino v. Indus. Crating Co.*, 358 F.3d 241,  
6 247 (3d Cir.2004)); *Anderson*, 477 U.S. at 255; see also  
7 *Matsushita Elec. Indus. Co. V. Zenith Radio Corp.*, 475 U.S.  
8 574, 587 (1986); *Curley v. Klem*, 298 F.3d 271, 276-77 (3d Cir.  
9 2002). In deciding the merits of a party's motion for summary  
10 judgment, the court's role is not to evaluate the evidence and  
11 decide the truth of the matter but to determine whether there  
12 is a genuine issue for trial. *Anderson*, 477 U.S. at 249.  
13 There can be "no genuine issue as to any material fact,"  
14 however, if a party fails "to make a showing sufficient to  
15 establish the existence of an element essential to that  
16 party's case, and on which that party will bear the burden of  
17 proof at trial." *Celotex*, 477 U.S. at 322-23. "[A] complete  
18 failure of proof concerning an essential element of the  
19 nonmoving party's case necessarily renders all other facts  
20 immaterial." *Id.* at 323; *Brightwell v. Lehman*, 637 F.3d 187,  
21 194 (3d Cir. 2011). To establish a § 1983 claim, a plaintiff  
22 must "demonstrate a violation of a right protected by the  
23 Constitution or laws of the United States that was committed  
24 by a person acting under the color of state law." *Nicini v.*  
25 *Morra*, 212 F.3d 798, 806 (3d Cir. 2000). In the context of a



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1 claim against a prison official, this requires showing that:  
2 (1) Plaintiff was deprived of a constitutional right that was  
3 sufficiently serious; and (2) the prison official was  
4 deliberately indifferent to the risk of this deprivation.

5 Additionally, the prison official must have "personal  
6 involvement in the alleged wrongs." *Rode v. Dellarciprete*,  
7 845 F.2d 1195, 1207 (3d Cir. 1988).

8 Here, Plaintiff alleges that Hauck violated § 1983 by  
9 failing to protect her from the abuse of Officers Melgar and  
10 Smalls. This claim fails because Plaintiff has not made a  
11 sufficient showing of deliberate indifference. To show the  
12 "deliberate indifference" necessary to sustain a prisoner's  
13 Eighth Amendment claim against a prison official, Plaintiff  
14 must show that an official "knows of and disregards an  
15 excessive risk to inmate health or safety." *Farmer v.*  
16 *Brennan*, 511 U.S. 825, 837 (1994). This knowledge requirement  
17 is subjective, not objective knowledge, "meaning that the  
18 official must actually be aware of the existence of the  
19 excessive risk; it is not sufficient that the official should  
20 have been aware." *Beers-Capital v. Whetzel*, 256 F. 3d 120,  
21 133 (3d Cir. 2001).

22 Here, Plaintiff alleges that Defendant Hauck received  
23 information regarding Defendant Melgar's inappropriate conduct  
24 as early as February 28, 2008 but failed to take any steps to  
25 protect Plaintiff against such conduct until June of 2010.

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1 Opp'n Br. 21, ECF No. 94. In support of this contention,  
2 Plaintiff relies on a four-page letter that is addressed to  
3 Hauck and appears to have been written by Therese Afdhal,  
4 another inmate at the Edna Mahan Correctional Facility. *Id.*  
5 Plaintiff has not submitted an affidavit or any other  
6 statement from Afdahl to confirm that she was, in fact, the  
7 author of this letter or that she actually sent the letter to  
8 Hauck. In his deposition, Hauck testified that he did not  
9 remember seeing the letter prior to his deposition. In  
10 addition, the letter does not contain any marks acknowledging  
11 receipt, despite the fact that other correspondence that Hauck  
12 received from Afdhal did contain such marks. Given  
13 Plaintiff's failure to authenticate the letter, the letter is  
14 not admissible. Moreover, even assuming it is admissible, the  
15 Court finds that its content was not sufficient to put Hauck  
16 on notice as to the risk of Officer Melgar's sexual abuse. In  
17 particular, the letter references, as an aside, instances of  
18 non-sexual "playing," which although inappropriate is a far  
19 cry from Melgar's sexual abuse, and thus did not put Hauck on  
20 notice as to the risk of this behavior.

21 In addition, to this letter Plaintiff also cites the  
22 certifications of inmates Michelle Ellis, Tasha Canada,  
23 Barbara Clark, Robin Streater, and Therese Afdahl in support  
24 of her contention that Defendant Hauck had knowledge of the  
25 risk of Officer Melgar's abuse as early as 2008. These

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1 certifications certify as to the truth of the allegations in  
2 the Second Amended Complaint in a separate action against  
3 Officer Melgar, captioned *Afdahl, et al, v. Melgar, et al.*,  
4 Docket Number HUN-L-464-07. This complaint alleges that  
5 "Defendant Hauck was personally informed by Plaintiff AFDAHL  
6 and/or others about the abusive behavior of Defendant MELGAR  
7 as early as 2008, yet did nothing to prevent it, nor did he  
8 report it to his superiors." This allegation, which vaguely  
9 refers to "Afdahl and/or others" and "abusive behaviors" is  
10 not a sufficient evidentiary basis on which a reasonable juror  
11 could find that Hauck was given notice of Defendant Melgar's  
12 sexual abuse of other inmates prior to June of 2010.  
13 Moreover, the Complaint indicates that, out of fear of  
14 retaliation, inmate Robin Streater did not disclose Melgar's  
15 sexual abuse prior to 2010. Accordingly, these certifications  
16 are not sufficient to defeat Defendants' motion for summary  
17 judgment as to the § 1983 claim against Hauck.

18 In contrast to Plaintiff's § 1983 claim against Hauck,  
19 Plaintiff's § 1983 claims against Defendants Johnson and Ellis  
20 is not based on Defendants' failure to protect her from  
21 Officer Melgar and Smalls' abuse, but rather on their own  
22 conduct. Specifically, Plaintiff alleges that Defendant  
23 Johnson verbally abused her and Defendant Ellis verbally  
24 threatened her to keep her from disclosing Officer Melgar's  
25 abuse. These allegations of verbal harassment, however, do

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1 not give rise to a constitutional violation enforceable under  
2 § 1983. *Prisoners' Legal Assoc. v. Roberson*, 822 F. Supp.  
3 185, 189 (D.N.J. 1993). Plaintiff also alleges that Defendant  
4 Johnson confiscated items that she purchased from the prison  
5 commissary, i.e., a bag of chips and a sewing kit. Defs.' SOF  
6 Ex. D at 112:11-113:6, ECF No. 86-5. These allegations do not  
7 rise to the level of "calculated harassment," and thus are  
8 also insufficient to support a claim under § 1983. *Prisoners'*  
9 *Legal Assoc.*, 822 F. Supp. at 189.

10 Accordingly, Plaintiff's claims for violations of the  
11 Federal and State Civil Rights Acts against Defendants Hauck,  
12 Ellis and Johnson fail as a matter of law. *Chapman v. New*  
13 *Jersey*, No. 08-4130, 2009 WL 263888, at \*7 (D.N.J. Aug. 25,  
14 2009) ("Courts have repeatedly construed NJCRA in terms nearly  
15 identical to its federal counterpart.").

16 Next, as to Counts Three and Five: Negligent hiring and  
17 negligence.

18 With respect to Plaintiff's negligence claims, as  
19 Plaintiff has not shown that either Defendant Ellis or Johnson  
20 had any supervisory responsibilities, Plaintiff has not shown  
21 that these Defendants had either a duty or power to prevent  
22 Officers Melgar and Smalls' conduct. Accordingly, Plaintiff's  
23 negligence claims against these Defendants fail.

24 In addition, with respect to Defendant Hauck,  
25 Plaintiff's negligence claims fail because Plaintiff has not

## MOTION

1 offered any admissible evidence to show that Hauck knew of  
2 Officer Melgar and Smalls' conduct prior to June 2010. Both  
3 claims of negligence hiring and negligence requires showing  
4 knowledge of the risk of harm. *Di Cosala v. Kay*, 91 N.J. 159,  
5 173 (1982) ("[A]n employer will only be held responsible for  
6 the torts of its employees beyond the scope of employment  
7 where it knew or had reason to know of the particular  
8 unfitness, incompetence or dangerous attributes of the  
9 employee and could reasonably have foreseen that such  
10 qualities created a risk of harm to other persons."); *Carter*  
11 *Lincoln-Mercury v. EMAR Grp.*, 135 N.J. 182, 194 (1994)  
12 ("Ability to foresee injury to a potential plaintiff . . . is  
13 a crucial element in determining whether imposition of a duty  
14 on an alleged tortfeasor is appropriate.") (internal citation  
15 omitted).

16 As to Counts Four, Six and Seven: State Law Intentional  
17 Torts.

18 As an initial matter, in its previous decision this  
19 Court dismissed Counts Four, Six, and Seven with prejudice as  
20 against Defendant Hauck because Plaintiff had not made "any  
21 specific allegations against Hauck for sexually or physically  
22 abusing Plaintiff." *Bernat v. State of NJ Dept. of*  
23 *Corrections*, No. 12-2669 (Dec. 31, 2013). Thus, now finding  
24 that the Complaint does not allege that either Defendant Ellis  
25 or Johnson sexually or physically abused the Plaintiff, the

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1 Court dismisses Counts Four, Six, and Seven with prejudice as  
2 against Defendants Ellis and Johnson. Furthermore, pursuant  
3 to N.J.S.A. 59:2-10, which insulates public entities from  
4 liability for intentional wrongdoing of their employees, these  
5 claims are also dismissed with respect to the State of New  
6 Jersey, Department of Corrections.

7 The Court will issue an Order consistent with this  
8 decision later on today. And with that, that's all that we  
9 have for this matter. Thank you very much, Counsels.

10 MR. PREUSS: Thank you, your Honor.

11 THE DEPUTY COURT CLERK: All rise.

12 (Court concludes at 11:48 a.m.)

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